Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992	)	MM Docket No. 92-266
Rate Regulation	)	

To: The Commission

Reply Comments of Consumer Federation of America

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Table of Contents

I. Introduction

The Consumer Federation of America (CFA)[1] hereby submits these reply comments in response to the comments filed in the

CFA will not repeat at length its arguments made in earlier rounds of this proceeding, in these reply comments. Rather, we will simply illustrate and summarily dispose of cable's failed arguments.

Cable's claim that the 1992 Cable Act supports erring in favor of allowing rates that are too high, is without a legal basis.[4] The same is true for the argument that "tier neutral" regulation is unjustified.[5] The cable industry complains about the construction of the price per channel variable, insisting that cable programming should be considered separately from basic service.[6] We have shown, and the Commission agreed, that there is a strong legal basis for using the same standard for regulating all tiers of service.

The industry's repeated threats of litigation, invoked to convince the FCC to abandon a sound regulatory approach, should be disregarded.[7] As the Commission well knows, absent total

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[3](...continued)
variables in the statutory definition of effective competition. Only 10 percent of the analysis is devoted to this question raised in the Further Notice, the issue of low penetration systems. See; Bessen, An Analysis of the FCC's Cable Television Benchmark Rates, June 17, 1993 (filed with Comments of TCI).

[4] Kelley, Economic Issues Raised by the Further Notice, June 17, 1993 at 4 (filed with Comments of Time Warner).

[5] Id. at 1-2.

[6] Id. at 1.

[7] Id. at 1

abdication of responsibility for regulation by the Commission, the industry would file legal challenges to the rules. It would be totally improper to permit threats of extensive legal challenges from keeping the Commission from carrying out Congress' mandate.

The cable industry once again argues that competitive systems represent disequilibrium, or price wars, so the data from overbuild communities should be disregarded.[8] As CFA and others have demonstrated and the Commission has recognized, these claims

that Congress' intent is properly carried out. The issues raised by the Commission in the Further Notice concern the amount of discretion the Commission has in deciding the means used to reach Congress' desired end -- cable rates at competitive market levels.

II. The Commission has a Duty to Discount Low Penetration Systems When Setting Competitive Benchmarks.

The cable industry admonishes the Commission for even considering narrowing its interpretation of the statutory definition of effective competition in establishing competitive benchmark rates, stating that it would violate the law.[9] That legal conclusion is challenged by other commenters[10].

While CEA reserves judgment on that precise question of

penetration systems[11]. CFA has supported this approach in all of its filings in this docket.

Clearly, Congress did not intend to leave the Commission with no discretion for determining the best means to achieve competitive market rates. The 1992 Cable Act instructs the Commission to "take into account" a number of important factors

III. It Would Not Be Arbitrary and Capricious for the Commission to Further Reduce Rates Based on the Data Received from the Industry.

Cable industry claims, that any further action taken by the Commission based on the data collected from the industry would be arbitrary and capricious, are completely without legal merit. For the rate regulation decision to be arbitrary and capricious, the Commission must: 1) rely on factors that Congress never intended to consider; 2) entirely fail to consider an important aspect of the problem; 3) offer an explanation which runs counter to the evidence presented or is implausible to the extent that it could not be considered a difference in view or the result of agency expertise.[14]

This standard is meant to place a very significant burden on parties challenging agency rules. Upon review, the court gives great deference to the agency's decision.[15] In light of the extensive record in this docket, CFA believes this burden could not be met by a party challenging rate relief averaging 10-28

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[14] Farmers Union Central Exchange, Inc. v. F.E.R.C., 734

percent, if ordered by the Commission.

The industry also claims the Commission's competitive benchmark must contain data from cable systems which fall under each category of the statutory definition of effective competition as a matter of law.[16] The theory is that anything else would "deviate from or ignore the ascertainable legislative intent."[17] Nowhere in the law is the Commission required to give equal weight to all types of systems which fall under the statutory definition of effective competition, a point which is not mentioned by the industry.[18]

CFA maintains that the only way the Commission can run afoul of the law and exceed its legal discretion would be to fail to bring rates down to truly competitive market levels. Anything less would be ignoring the marketplace realities evidenced by the data submitted by the industry and consequently Congress' mandate under the 1992 Cable Act.

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[16] See e.g.; Comments of Time Warner at 5.

[17] Id. citing Ethyl Corp. at 36.

[18] The industry seems to confuse the intent of Congress,

IV. Cable Industry Claims that the Economic Data Provided to the Commission do not Provide a Sufficient Basis for Ordering Rate Reductions Greater than 10 Percent is Simply Incorrect.

With respect to unfounded industry claims of statistical manipulation, we have the following observations on the cable industry comments. The cable industry suggests that the Commission selectively edited the data. They claim the FCC edited out data that appear contrary to its point of view but report no errors in the other direction, which support its point of view.[19] We find no support in the data and the Commission's actions to support this allegation.

There is significant disagreement among cable industry experts. Some commenters argue that the Commission's data sample size is just too small, while others admit that it is large enough in a statistical sense.[20] In fact, the Commission's survey includes approximately one out of every six cable subscribers in the nation. A great deal of public policy is set

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[19] Perl, McLaughlin and Falk, Econometric Analysis of the FCC's Proposed Competitive Benchmarks, June 16, 1993 at 5 (filed with Comments of Time Warner).

[20] *Compare* Kelley at 2 ("...then rates for an entire industry will be based on the experience of less than 50 firms.") *with* Bessen at 13 ("While the number of effectively competitive systems is not unusually 'small' in the conventional statistical sense, it is small given the purposes for which the Commission will be using the data").

on much smaller surveys.[21] Some commenters insist on strict statistical interpretations, while others play fast and loose with statistical significance.[22]

The cable industry suggests that different functional forms of the economic relationships may hold, depending on system size.[23] However, if the Commission were to follow this reasoning, it would constantly be whipsawed by regrouping of systems, since it is easy to find some other group to which the

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[21] The FCC's analysis of telephone penetration rates, for example, is based on a sample of less than one-in one thousand. The FCC's statistical analysis of city-by-city telephone prices involves a survey of only 200 cities, with the underlying data generated by relatively small surveys within each city.

[22] *Compare* Kelley at 3 ("Using standard statistical methodology, it is impossible to reject the hypothesis that the 'true' difference between the competitive and the random sample firms could be as low as -3.6 percent.") *with* Bessen at 24 (Moreover, the F-statistic for the largest subscriber class is only slightly short of being significant"). Bessen could equally say that one of the statistics is only slightly past significance. When the same test is applied to a different subsample, none would be much past significance; Perl at 2, n.2, simply reports levels of statistical significance, ("[H]omogeneity with respect to size when the sample is divided into systems above and below 10,000 subscribers is rejected at the 98 percent level. Homogeneity of the narrower competition group versus all regulated firms is rejected at the 90 percent level. By contrast, the broader competitive group passes the test for homogeneity at the 75 percent level.") By standard statistical methodology, rejection at the 90 percent level is no rejection at all.

[23] Bessen at 16 ("The Commission's second implicit assumption is that the same equation explains the variance in rates for all cable systems regardless of the number of subscribers that the system serves."); See also; Perl at 7-8.

statistical model fits differently.[24] The Commission should not be drawn into the game of a never-ending search for the "right" groups of systems.

The industry complains about the measurement of the equipment variable.[25] After complaining that the Commission's construction of the equipment component of monthly charges may be biased against non-competitive systems, Bessen constructs an equipment variable that may be biased against competitive system by assuming that competition cannot eliminate equipment charges. The assumption imposed has a very great cost in terms of the number of observations, reducing the total by over two-thirds, and it is certainly farther off the mark than the Commission's approach.

The cable industry suggests that more variables be included in the model. The suggested additional variables are PEG channels, density, bad debt, percent of underground cable and equipment quantities.[26] The Commission has tested a logical set of variables and the demand to include more has little if any impact on the outcome of the analysis.

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[24] Perl divides the systems above and below 10,000. Bessen divides them into five different groups.

[25] See; Perl at 7; Bessen at 17.

[26] Perl at 6-7.

CFA agrees with the cable industry that it is inappropriate to eliminate the low penetration rate systems on the assumption that they are not really competitive, without questioning the head-to-head competition involved in other situations.[27] We believe municipally owned systems may not be "truly" competitive. Because these systems are small and few in number, especially if observations are weighted, elimination of this category of systems will have little if any impact on the outcome of the analysis.

With respect to the assertion that there is no independent source of evidence to corroborate the Commission's findings, CFA is convinced that our original analysis clearly supported a larger rate reduction than 10 percent.[28] Although some cable commenters offer conceptual criticisms of CFA's analysis, no empirical refutation is offered.[29]

The Commission could easily create a variable benchmark to

however, does not seem to be the point of the cable industry's comments.

The cable industry seems determined to show that no single estimate of competitive effect can apply exactly to all systems. As Bessen puts it, "In short, all of these tests indicate there is at least considerable uncertainty surrounding the applicability of a single differential to all systems."[30]

Uncertainty pervades even the most detailed cost-based regulation. For example, estimates of rates of return frequently vary dramatically (by three or four percentage points) according to the method and assumptions used. Formulaic approaches, which have become more prevalent, entail even greater uncertainties -- i.e. indirect measures of productivity changes. The existence of uncertainty has never been a barrier to regulatory ratemaking, as long as the results achieve rough justice.

With Congress urging the Commission to reduce administrative burdens, a fact which the cable industry repeatedly invokes in an effort to dissuade the Commission from stimulating detailed cost of service proceedings, uncertainty due to averaging and estimation is inevitable. Our original analysis showed that firms facing head-to-head competition have much lower rates than non-competitive firms. We showed this by cross-sectional

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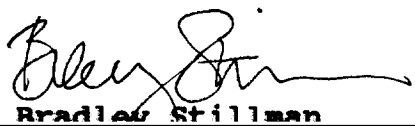
[30] Bessen at 24.

comparisons and historical cost projections. If head-to-head competition is the standard to which Congress aspired to have the

V. Conclusion

Based on the data submitted by the cable industry and the record in this docket, the Commission must effectuate Congress' intent by setting benchmarks which emulate truly competitive market conditions. CFA urges the Commission to give significantly less weight to low penetration and municipally owned systems and roll back rates approximately 28 percent, on average, to truly competitive market levels.

Respectfully submitted,



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